

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Terry Kalil,
Complainant,
vs.

**FINDINGS OF FACT,
CONCLUSIONS AND ORDER**

Larry A. Knutson,
Respondent.

The above-entitled matter came on for an evidentiary hearing on September 7, 2004, before a panel of three Administrative Law Judges: Barbara L. Neilson (presiding judge), Richard C. Luis, and Beverly Jones Heydinger. Pursuant to an agreement of the parties, the panel made its determination based on the record created at the August 27, 2004, probable cause hearing and documents filed by the parties by September 7, 2004. No separate evidentiary hearing was held. The hearing record closed on September 7, 2004.

Terry Kalil ("Complainant"), 23586 Warbler Way, Detroit Lakes, Minnesota 56501, participated in the probable cause hearing by telephone and submitted additional material for consideration by the panel.

Larry Knutson ("Respondent"), 33165 State Highway 334, Detroit Lakes, Minnesota 56501, participated in the probable cause hearing by telephone and submitted additional material for consideration by the panel.

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF THE ISSUES

1. Are Larry Knutson's lawn signs "campaign material" within the meaning of Minn. Stat. § 211B.01, subd. 2?
2. Did Larry Knutson violate Minn. Stat. § 211B.04(b), by failing to put disclaimers on his lawn signs?
3. What remedy, if any, is appropriate?

Based upon the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. In August of 2004, Larry Knutson posted approximately 100 signs in District 1 of Becker County reading "Vote Larry KNUTSON Commissioner District 1." Mr. Knutson paid approximately \$388 of his own funds for the signs and stands.

2. Mr. Knutson did not include on the signs a disclaimer identifying the name and address of the person who paid for the signs.

3. On August 7 and 15, 2004, Mr. Knutson participated in two parades. One parade was held in Frazee, Minnesota and the other was held in Wolf Lake, Minnesota. At each parade, Mr. Knutson and his family rode in a pickup truck, which was identified with Mr. Knutson's name and the office he seeks, and members of Mr. Knutson's family tossed penny candy to children along the parade route.

4. On August 25, 2004, Ms. Terry Kalil filed a complaint with the Office of Administrative Hearings alleging that Mr. Knutson violated Minn. Stat. § 211B.04, by failing to have a disclaimer on his signs, and Minn. Stat. § 211B.13, by giving out candy at the two parades.

5. On August 27, 2004, Administrative Law Judge Kathleen Sheehy held a probable cause hearing on the allegations contained in Ms. Kalil's complaint. Both parties participated by telephone^[1] and the hearing was tape-recorded. During the hearing, both parties agreed that, if probable cause were found, a three-judge panel could issue a dispositive decision based on the record created at the probable cause hearing and that no evidentiary hearing would be necessary.

6. By Order dated August 31, 2004, Judge Sheehy found probable cause to believe Mr. Knutson violated the disclaimer requirements of Minn. Stat. § 211B.04, with respect to his signs. Judge Sheehy, however, found no probable cause to believe that, by permitting family members to toss candy at two parades, Mr. Knutson violated Minn. Stat. § 211B.13, which prohibits bribing or giving any thing of monetary value in order to induce a voter to vote in a particular way.

7. On September 1, 2004, Ms. Kalil filed a petition for reconsideration with respect to the bribery allegation.^[2] In an Order dated September 2, 2004, Chief Administrative Law Judge Raymond Krause upheld Judge Sheehy's ruling and found that her order dismissing the bribery allegation was not erroneous.^[3]

8. On September 2, 2004, the remaining allegation in the complaint was assigned to the undersigned panel of three Administrative Law Judges.

9. On September 7, 2004, the panel met and considered the record, including the tape recording of the probable cause hearing and all correspondence submitted by the parties.

Based upon the foregoing Findings of Fact, the undersigned panel of Administrative Law Judges makes the following:

CONCLUSIONS

1. The Administrative Law Judges are authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minn. Stat. § 211B.01, subd. 2, as amended in 2004, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”^[4]

3. Minn. Stat. § 211B.04, as amended in 2004, provides in relevant part, as follows:

(a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.

(b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the committee,(address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the committee,(address), in support of(insert name of candidate or ballot question)" for material prepared and paid for by a person or committee other than a principal campaign committee.

(c) In the case of broadcast media, the required form of disclaimer is: "Paid for by the committee."

(d) Campaign material that is not circulated on behalf of a particular candidate or ballot question must also include in the disclaimer either that it is "in opposition to(insert name of candidate or ballot question.....)"; or that "this publication is not circulated on behalf of any candidate or ballot question."

(e) This section does not apply to objects stating only the candidate's name and the office sought, fund-raising tickets, or personal letters that are clearly being sent by the candidate.

(f) This section does not apply to an individual or association who acts independently of any candidate, candidate's committee, political committee, or political fund and spends only from the individual's or association's own resources a sum that is less than \$500 in the aggregate to produce or distribute campaign material that is distributed at least seven days before the election to which the campaign material relates.^[5]

4. Mr. Knutson's lawn signs are “campaign material” and not “objects” within the meaning of Minn. Stat. § 211B.04(e).

5. Mr. Knutson violated Minn. Stat. § 211B.04(a) and (b) by failing to have the required disclaimer on his signs.

6. Pursuant to Minn. Stat. § 211B.35, subd. 2, the panel of Administrative Law Judges may impose a civil penalty of up to \$5,000 for any violation of chapter 211A or 211B.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That Respondent remove his lawn signs or bring them into compliance by adding the disclaimer required under Minn. Stat. § 211B.04, by Monday, September 13, 2004.

2. That Respondent pay a civil penalty of \$100 by October 15, 2004, for violating Minn. Stat. § 211B.04. The check should be made payable to "Treasurer, State of Minnesota", and sent to the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

Dated: September 10, 2004

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”^[6] Campaign material is required, under Minn. Stat. § 211B.04(a) and (b),^[7] to include a disclaimer identifying the name and address of the person or committee that prepared or disseminated the material.

Mr. Knutson admits that he was responsible for putting up the lawn signs at issue in this case and that he inadvertently failed to include a disclaimer. At the probable cause hearing, he argued nonetheless that his signs are “objects” within the meaning of § 211B.04(e) that do not require a disclaimer. Under the statute, objects “stating only the candidate’s name and the office sought” do not require a disclaimer. Mr. Knutson’s signs contain more than the candidate’s name and office sought. The signs read: “Vote Larry Knutson Commissioner District 1.” (Emphasis added.) The signs urge readers to vote for Larry Knutson and are, therefore, material disseminated for the purpose of influencing voting. Unlike objects that presumably would have an intrinsic value separate from their promotional message, the signs’ only purpose is to promote the candidate. The panel finds that Mr. Knutson’s lawn signs meet the definition of “campaign material” and are not “objects” within the meaning of Minn. Stat. § 211B.04(e). Therefore, Mr. Knutson’s signs did require disclaimers under Minn. Stat. § 211B.04.

Mr. Knutson also argued that because he spent less than \$500 on the signs, he is not required to use the disclaimer under section 211B.04(f). Subsection (f), however, does not apply to Mr. Knutson because it concerns only individuals or associations who act independently of a candidate, and not the candidate himself. Thus, Mr. Knutson does not fall within the exception set forth in section 211B.04(f).

As Judge Sheehy noted in her probable cause order, the United States District Court for the District of Minnesota recently declared the disclaimer requirements of Minn. Stat. § 211B.04 (2003) to be a facial violation of the First Amendment and has enjoined the state from enforcing the statute.^[8] In that case, *Minnesota Citizens Concerned for Life, Inc. v. Kelley*,^[9] the federal court focused on Minn. Stat. § 211B.04(f) as it relates to anonymous pamphleteering and found that the disclaimer requirement directly attacks core political speech “unsupported by an interest in avoiding the appearance of corruption.”^[10] The court reasoned that, unlike disclosure requirements related to lobbyists, “who have direct access to elected representatives” and thus “may well present the appearance of corruption” if their activities are not disclosed, Minnesota’s disclaimer requirement “rests on different and less powerful state interests,” such as ensuring responsible campaigning.^[11] With no overriding interest supporting the statute, the court found that Minn. Stat. § 211B.04 was unconstitutional under the First Amendment.

The state did not appeal that decision. The legislature amended section 211B.04(f) during the 2004 session, however, in a direct effort to cure the constitutional defects found by the federal court.^[12] Specifically, the legislature added the phrase “or association” to the exemption provided in subsection (f) and raised the monetary limit

from \$300 to \$500. Presumably these changes will permit organizations, such as MCCL, and not just individuals, to engage in anonymous political speech, provided they spend less than \$500.^[13]

The case at hand does not concern subsection (f). Instead, the issue in this case is whether Mr. Knutson, who is a political candidate, is required to put disclaimers on his campaign signs and other campaign material. The federal court's decision in *MCCL* did not address whether requiring candidates to be accountable for the materials they distribute violates the First Amendment. Since the constitutional concerns addressed in *MCCL* have no clear application to candidates themselves, and given the legislature's amendments to the statute in direct response to the decision, the panel finds that the disclaimer requirements of Minn. Stat. § 211B.04(a) and (b) are valid and apply to Mr. Knutson.^[14] Accordingly, Mr. Knutson is ordered to remove the lawn signs or to bring them into compliance with Minn. Stat. § 211B.04 by affixing the appropriate disclaimer. In addition, Mr. Knutson is ordered to pay a civil penalty of \$100. The panel finds this amount to be reasonable and appropriate. Mr. Knutson's failure to include the disclaimer on his signs was due to inadvertence and was not a deliberate attempt to mislead the public or circumvent the law. In addition, Mr. Knutson has indicated a willingness to remedy the problem and he already has taken steps to add the disclaimer to his signs and other campaign material.

After the record of the probable cause hearing closed, Ms. Kalil submitted additional information that Mr. Knutson's printed campaign flyers did not include the required disclaimer. In a letter to the panel dated September 6, 2004, Mr. Knutson stated that he has since handwritten the required disclaimer on the back of his flyers. The flyers were not addressed at the probable cause hearing, and will not be addressed here.

B.L.N., R.C.L., B.J.H.

^[1] See, Minn. Stat. § 211B.36, subd. 4, allowing hearings to be conducted by conference telephone call.

^[2] Minn. Stat. § 211B.13.

^[3] See, Minn. Stat. § 211B.34, subd. 3(b).

^[4] Minn. Stat. § 211B.01, subd. 2; Minn. Laws 2004 ch. 293, art. 3 § 1.

^[5] Minn. Stat. § 211B.04; Minn. Laws 2004 ch. 293, art. 3, § 2.

^[6] Minn. Stat. § 211B.01, subd. 2.

^[7] Minn. Stat. § 211B.04; Minn. Laws 2004 ch. 293, art. 3, §§ 1 & 2.

^[8] *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 291 F.Supp.2d 1052 (D. Minn. 2003).

^[9] *Id.*

^[10] 291 F.Supp.2d at 1069, quoting, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 131 L.Ed.2d 426, 115 S.Ct. 1511 (1995) (US Supreme Court decision striking down Ohio statute that made it a crime to distribute anonymous campaign material.).

^[11] *Id.*, quoting *McIntyre*, 514 U.S. at 354 and 356.

^[12] Recording of May 15, 2004, legislative floor discussion regarding proposed amendments to §211B.04, House Television Archives 2003-2004, House Floor Session – part 5 of 5 (discussion beginning at 52:00) (<http://www.house.leg.state.mn.us>). Tape recordings of committee meetings and floor debates may be considered as a factor in determining the intent of the legislature when a statute, or its application, is

ambiguous. *First Nat. Bank of Deerwood v. Gregg*, 556 N.W.2d 214, 217 (Minn. 1996); *Handle With Care, Inc. v. Department of Human Services*, 406 N.W.2d 518, 522 (Minn. 1987).

^[13] The legislature also amended the definition of “campaign material” during the 2004 session to address concerns raised by the court in the *MCCL* decision.

^[14] In addition, Administrative Law Judges lack jurisdiction to declare a statute facially unconstitutional. See, *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 369 (Minn.1977); *In re Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. App. 1993).